

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10681 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : YES
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

FARIDKHAN GULZARKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10681 of 2000
MR DILIP B RANA for Petitioner No. 1
Ms. Shraddha Trivedi, AGP for Respondents No. 1 & 4.
MR HS MUNSHAW for Respondents No. 2-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 29/11/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Dilip B. Rana for
the petitioner; Ms. Shraddha Trivedi, learned AGP for

respondent No. 1 and 4; Mr. Munshaw, learned advocate for respondents no. 2-3. In this petition, this Court has issued rule on 21st November, 2000 by order dated 11th October, 2000. Respondent No.3 has filed affidavit in reply on 28th November, 2000 alongwith which, certain papers have been produced and thereafter, rejoinder thereto has been filed by the petitioner on 11th February, 2001.

The facts leading to the filing of the present petition, in brief, are to the effect that the date of birth of the petitioner as per the final examination certificate is 31.3.1940. The petitioner was appointed as Malaria Surveillance Inspector at Sharigam, Taluka Umargam, District Valsad on 2.9.1960. In the year 1983, the petitioner was promoted as malaria laboratory technician at Surbhan, Tal : Bardoli, Dist : Surat in the pay scale of Rs.1350-2200. On 1.4.1985, the petitioner was transferred to the Primary Health Centre, Vasuki, Dist : Bardoli. According to the petitioner, in the year 1985, he came to know that his birth date was wrongly recorded in his service record as 31.3.1939 instead of 31.3.1940. He, therefore, applied for necessary changes in the service record in respect of the birth date from 31.3.1939 to 31.3.1940 by submitting the documentary evidence in the form of SSC Examination Certificate which application of the petitioner was approved by the Medical Officer, PHC, Vasuki and accordingly necessary changes were made in the service record of the petitioner as regards his birth date. Thereafter, on 1.8.1989, the petitioner was transferred from Vasuki to Sevni, Taluka Kamrej on the same post where he retired on account of superannuation on 23.3.1998 as Malaria Technician (Lab) from PHC Sevni with effect from 31.3.1998. According to the petitioner, during the year 1998-99, he approached the respondent authorities time and again for his retiral benefits but the same were not paid to him nor any positive response was given to his requests. The petitioner, therefore, wrote letter dated 8.5.2000 to the Director of Pension Department for not granting pension to him though he retired on 31.5.1998. The petitioner also wrote a letter on 11.5.2000 to the District Malaria Officer, Nanpura, Surat in this regard. The Accounts Officer (Pension) wrote a letter to the District Malaria Officer on 23.5.2000 about the clarification of the pension of the petitioner. Thereafter in or around 27/31st May, 2000, the petitioner was given reply by the District Malaria Officer in connection with his representation made on 11.5.2000. Thereafter, on 28.6.2000, the District Development Officer wrote a letter to the Private

Secretary, Health and Family Welfare Department, Gandhinagar about the retirement benefits of the petitioner. However, same has not been paid to the petitioner and, therefore, the petitioner has filed the present petition before this Court.

During the course of hearing, learned advocate Mr. Rana appearing for the petitioner has submitted that during the pendency of this petition, the State Government has sanctioned the pension and has finalized the pension of the petitioner by communication dated 11.10.2000. He has submitted that while finalizing the pension of the petitioner, the respondents have effected recovery of Rs.1,04,920.00 from the amount of the gratuity of the petitioner on the ground that the petitioner has worked for a period of one year on the basis of changed date of birth date and on that ground, the respondents have not paid the amount of Rs.1,04,920.00 to the petitioner from the amount of gratuity payable to the petitioner. He has, however, submitted that the rest of the amount of retiral benefits under different head has been paid to the petitioner.

I have also heard Ms. Trivedi, learned AGP for the State Authorities as well as Mr. Munshaw for the respondents NO. 2-3. Learned advocate Mr. Munshaw appearing for the respondents No.2-3 has submitted that the amount in question has not been paid to the petitioner because the petitioner has got his birth date changed from 31.3.1939 to 31.3.1940 and such change has been made by the officer who has no power to do so and, therefore, the petitioner cannot be given benefit of the changed birth date. He has submitted that the powers to change and correct the date of birth date of an employees are vested with the State Government and no other officer has such powers and, therefore, according to Mr. Munshaw, the amount of Rs. 1,04,920.00 has rightly been recovered from the amount of gratuity payable to the petitioner by the concerned authority and, therefore, this Court should not entertain the present petition.

In reply to the contentions raised by Mr. Munshaw, learned advocate Mr. Rana has submitted that the date of birth of the petitioner has been changed on the basis of the SSC Certificate by the concerned Medical Officer and necessary entry to that effect has been made in the service record of the petitioner by the concerned officer which is at page 36 of the petition below such entry, initial has also been made by the concerned officer while effecting change in the date of birth of the petitioner at page 36 which has been produced by the

respondents no.2-3 alongwith their reply. From page 36, it does appear that initially date of birth of the petitioner was recorded as "31st March, 1939" which was subsequently corrected as "31st March, 1940" on the basis of the SCC Certificate which has been verified by the officer concerned and initial has also been made in the first page of the service book of the petitioner long ago in the year 1985. He has further submitted that the petitioner was permitted to work as per his corrected date of birth namely 31.3.1940 and was permitted to retire on the basis of his corrected date of birth. As regards the contention of Mr. Munshaw that such powers are vested with the State Government, he has submitted that if such powers are vested with the State, then also, on and from the date of such change in the date of birth of the petitioner till the date of his superannuation, the respondents were not prevented by any authority from initiating appropriate proceedings in accordance with law in that regard but till the date of retirement of the petitioner, no such action has been taken and he was permitted to work for the said period and, therefore, now the respondents are estopped from raising such contention.

In this petition, it is not an important as to whether the date of birth of the petitioner has rightly been changed or not. In this petition, it is an admitted fact that initially the birth date of the petitioner was recorded as "31st March, 1939" which has subsequently been changed to "31st March, 1940" in the year 1985. It is also not in dispute that after such correction made in the service record of the petitioner, the petitioner was permitted to work and was permitted to retire in the year 1998 on the basis of the corrected birth date. It is also not in dispute that during the said period of one year, the petitioner has got the salary for the work done by him. Therefore, in light of these undisputed facts, the question required to be examined by this Court is whether the petitioner is entitled to have the salary of this one year period from the respondents or not and whether the respondents are justified in recovering the amount of Rs.1,04,920.00 towards the salary for the said one year period from the amount of gratuity payable to the petitioner.

There is no dispute that the petitioner has in fact worked upto 31st March, 1998 which includes one year period for which the petitioner was permitted to work on the basis of his corrected date of birth. Once the petitioner has worked for that period and he was allowed to work for the said period by the respondents without

raising any objections on the basis of change made in the date of birth of the petitioner, then, the petitioner is certainly entitled to have the salary of that period for which he was permitted to work by the respondents. During this disputed period of one year, each month, the petitioner was paid his salary regularly by the respondents no.2-3. However, subsequently, while finalizing the pension papers of the petitioner, the respondents no.2-3 have acted on the decision of the first respondent and have decided to recover the amount of salary paid to the petitioner for the said period of one year and the said amount which was paid to the petitioner towards his salary every month has been recovered from the amount of gratuity of the petitioner. In view of these undisputed facts, learned advocate Mr. Rana appearing for the petitioner has relied upon two decisions of this Court as under :

- (1) Bachu Laxman v. Union of India and others reported in 1984 (2) GLR 1336.
- (2) A.P. Patel v. State of Gujarat & Others reported in 2000 (2) GLR 975.
- (3) C. Ajitkumar versus State of Kerala, reported in 2000 AIR SCW 4674 (2) Supp.

Relying upon the aforesaid two decisions of this Court, learned advocate Mr. Rana has submitted that the petitioner is entitled for one year on the principles of quantum merit. He has also submitted that before passing an order to deduct Rs.1,04,920.00 from the amount of gratuity, no opportunity was given to the petitioner and, therefore, the order of deduction of Rs.1,04,920.00 from the retirement benefits of the petitioner is illegal and is required to be quashed and set aside. Learned advocate Mr. Munshaw has reiterated his submission that since the date of birth of the petitioner has not been changed in accordance with the procedure and rules, the petitioner is not entitled to have the salary for the said one year period and the said amount has rightly been recovered by the respondents.

After considering the submissions made by the learned advocate Mr. Rana for the petitioner, Mr. Munshaw for respondent No.2-3 and Ms. Trivedi, learned AGP for respondents NO.1-4, according to my opinion, the respondents have recovered the amount of Rs.1,04,920.00 from the retirement benefits of the petitioner for the period for which the petitioner has actually worked and he was actually allowed to work without any interruption and objection and the change made in the date of birth by the officer concerned has not been challenged before the

higher authority. Not only that, same has also not been set aside by any higher authority. Therefore, when the change in the date of birth has remained in tact since 1985 and has not been set aside by any higher authority, the petitioner would become entitled to work for that one year and when the petitioner has worked for that period without any objection and interruption, then, the petitioner is entitled to have the salary for the said period, as a matter of right, in view of the observations made and view taken by this Court in case of Bachu Laxman v. Union of India (supra). In para 6 and 7 of the said decision, this Court (Coram : I.C.Bhatt,J.) has held as under:

6. It is surprising to note that even though

the Railway Administration has prayed in civil application no. no. 1359 of 1983 to vacate or suitably modify the interim order passed by this court and to allow the railway administration to retire the petitioner on 31.3.1983 as per the extant railway rules, and got the interim relief vacated with effect from 31.3.1983, no action appears to have been taken for fixing the pension, gratuity and other retirement benefits to the petitioner. The railway authorities are under the statutory obligation to give all the benefits to the petitioner on his retirement from service. It may be noted here that the petitioner was in continuous service of the railway administration and the railway authorities having allowed him to work and having taken the work the petitioner till 31.3.1983, and the petitioner having continued a service under the orders of the Court till that date, the railway administration cannot now withdraw benefits that have been granted to him. The railway administration cannot withdraw the benefits that accrued to the petitioner on the basis of the last pay drawn and the said benefits cannot be calculated as if the petitioner has retired on some earlier date. Even in other Government department, if any employee is given extension his retirement benefits are counted on the basis of last drawn salary and not on any other basis. The petitioner having been continued on the same post with all benefits attached to the post now cannot be denied the retirement benefits on the basis of last salary drawn and the railway administration cannot take the stand that the petitioner will be only entitled to the retirement benefits on the basis

as if the petitioner had retired on some earlier date i.e. 31.3.1981. The railway filed the above civil application only on 23.3.1983 to allow them to retire the petitioner with effect from 31.3.1983. Till that date the petitioner must have been given all the benefits as if he was in continuous service. The railway administration now cannot withdraw those benefits after having taken work from the petitioner till 31.3.1983 and for all purposes the petitioner will have to be treated in service of the railway administration upto 31.3.1983.

7. This Court in special civil application no. 1336 of 1975 (Coram : D.A. Desai, J.) decided on April 25, 1977 in a similar situation directed the railway administration to give pension and other retirement benefits to the concerned employee on the basis of the last pay drawn. In that judgment, this Court observed as under:

'..... Now, that he is going out, the only conclusion which Mr. Bhatt wants which even in law would be legitimate to him is that he has continued to serve under the interim relief granted by the Court, the benefit that accrued to him on the basis of last pay drawn pension, various retirement benefits should not be withdrawn and he should not be refixed at the starting of the salary scale. Whether I like or not, that is the law. Rules at present governing retirement benefits especially pension and gratuity refer to the average of 10 month's last salary. It is immaterial that he continued to enjoy the benefit under interim relief granted by the court and for that he has been in receipt of this benefit. In other words, he would be entitled to pension and other retirement benefits on the pay that he would draw at present on 30.4.1977 when he would walk out as superannuated. With these observations, the petition stands disposed of with no order as to costs. "

Thus, the petitioner in the aforesaid decision was due to retire on 31.3.1981 whereas the railway

authorities moved an application in the matter for retiring the petitioner only on 31.3.1983 and this Court, considering the facts and circumstances of the said case, has held that the railway administration cannot withdraw those benefits after having taken work from the petitioner therein till 31.3.1983 and for all the purposes, the petitioner will have to be treated in service of the railway administration upto 31.3.1983 considering the fact that the work was taken from the petitioner during the said period. In the instant case also, after the date of birth was changed in the service record by the officer concerned in the year 1985, no steps were taken by the authorities for recorrecting his date till the date of his superannuation; he was permitted to work for a period of one year more as per the corrected date of birth in his service record; after his retirement also, and before deducting the aforesaid amount from the gratuity amount of the petitioner herein, the respondents have not set aside the earlier entry of birth date of the petitioner. It is only after the petitioner approached this Court by filing the present petition, the respondents cleared his pension papers and for the first time declared that the change of birth date made in the service record of the petitioner was not in accordance with the procedure and rules and regulations of the petitioner and on that basis, after recovering the amount of one year salary from the gratuity amount of the petitioner, paid all remaining retiral benefits while fixing the pension of the petitioner herein. In view of the principles laid down in the aforesaid decision, the respondents cannot be permitted to do so and cannot recover such amount since the petitioner was permitted to work during the said period and was paid his salary for the work done by him during the said period.

In case of A.P. Patel versus State of Gujarat and others (supra), this Court (Coram : J.N. Bhatt, J.) has held as under in para 3 and 4 of the decision :

"3. Subsequently, the impugned order at Annexure G dated 24.10.1989 came to be recorded cancelling the earlier order of DDO granting the correction in the date of birth in the service book retrospectively without giving an opportunity of hearing to the petitioner who had retired upon superannuation with effect from 31.8.1988. The impugned order is dated 22.5.1989. Thus, the impugned order quashing the order of DDO by the Development Commissioner has been passed after almost ten months of the retirement

of the petitioner on the basis of correct date of birth which is 13.8.1930. Necessary entry in the service book came to be recorded and confirmed on 22.2.1984. Accordingly, the petitioner received salary, increments and continued to work upto 31.8.1988. The impugned order undoubtedly radiates that the petitioner has been visited with penal consequences and also civil consequences without getting an opportunity of being heard which is diametrically opposite to the doctrine of audi alteram partem, since the recovery of the amount of increment during the last year of service of the petitioner was sought, relief is also claimed against such an illegal action. In short, it is the case of the petitioner that he is entitled to all the pensionary benefits treating the entire period of service till the date of actual retirement took place on 31.8.1930. The contention of the respondent authorities is that the period of last year cannot be considered for computation of pensionary benefits as the change effected in the date of birth and resultant change in the service book was not bona fide and, therefore, at the best, the last year's service could be treated as fresh appointment.

4. After having considered the facts and circumstances and the rival submissions raised before this Court, it is evident that the impugned order of the respondent No.2 dated 22.5.1989, copy of which is at annexure F to the petition is tainted with the vice of principle of audi alteram partem and also full application of mind. Only on this ground itself, it merits to be revoked restoring the order recorded by the respondent no.3 and confirmed by respondent No.2. In the result, the impugned order is quashed and set aside. The decision of the respondent authority to treat the petitioner retired from service with effect from 31.8.1987 as fresh appointment of the petitioner as protected in the impugned order dated 24.10.1989 by the respondent No.1 is held to be invalid and illegal. The recovery sought pursuant to the said order is also invalid and bad in law. The petitioner, obviously, therefore, throughout entitled to all the pensionary benefits treating the last year period as regular service period. Therefore, the pensionary benefits and the resultant entitlements shall be paid to the petitioner by

the respondent authority computing the period from 1.9.1987 to 31.8.1988 as regular and continuous service period and the resultant delay occurred in making payment thereof is also required to be compensated. The respondents are hereby ordered and directed to pay all the retiral benefits with 12 percent interest per annum on the delayed payment till the payment is made. It is also directed that the recovery effected pursuant to the impugned order which has been now quashed shall be reimbursed to the petitioner with interest at 12 percent. The application is partly allowed. Rule is made absolute to the aforesaid extent. No costs."

In the instant case also, before effecting the recovery of Rs. 1,04,920.00 from the retiral benefits of the petitioner, the respondents have not afforded any opportunity of hearing to the petitioner though the action on the part of the respondent was adversely affecting the petitioner and, therefore, in view of the principles laid down by this Court in the aforesaid decision, the respondents are required to be directed to pay to the petitioner an amount of Rs.1,04,920.00 which were recovered by them from the amount of gratuity payable to the petitioner without affording any opportunity of hearing.

After considering the observations made in the aforesaid two decisions of this court and also looking to the undisputed facts, I am of the opinion that the petitioner is entitled to have the salary for one year period which was disputed by the respondents and the respondents are not justified in recovering the amount of Rs.1,04,920.00 from the retirement benefit for the salary which was paid to the petitioner for the said period by the respondents without any objection. The respondents are, therefore, not justified in recovering the said amount and such an action on the part of the respondents is required to be quashed and set aside.

For the aforesaid reasons, petition is allowed with a direction to the respondents to pay Rs.1,04,920.00 (Rs.one lac four thousand nine hundred twenty only) to the petitioner within two months from the date of receipt of writ of this order. Rule is made absolute in terms indicated hereinabove with no order as to costs. Direct Service is Permitted.

29.11.2001. (H.K. Rathod, J.)
Vyas

